FILE COPY

FILED
JAN 3 1972
E. ROBERT SEAVER, CLE

No. 71-288

In the Supreme Court of the United States

OCTOBER TERM, 1971

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ARLO TATUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

ERWIN N. GRISWOLD,
Solicitor General,
ROBERT C. MARDIAN,
Assistant Attorney General,
ROBERT L. KEUCH,
GEORGE W. CALHOUN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional and statutory provisions involved	2
Statement	3
a. Surveillance	5
b. Reports and files	7
Summary of argument	13
Argument:	
A claim that the First Amendment rights of others are chilled, due to the mere existence of Army surveillance activity at public gatherings, does not establish a justiciable controversy, and is not a claim that these respondents have standing to raise	17
A. Respondents' complaint does not state any justiciable issue	18
B. Respondents have no standing to maintain this suit	35
Conclusion	42
Appendix A	43
Appendix B	45
Appendix C	53

CITATIONS

Cases:	
Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450	18, 22
American Dietaids Co. v. *Celebrezze*, 317 F. 2d 658	18, 28
Anderson v. *Sills*, 56 N.J. 210, 265 A. 2d 678	32

Cases—Continued

	Page
Associated Industries v. *Ickes*, 134 F. 2d 694, vacated for mootness, 320 U.S. 707	37
Association of Data Processing Service v. *Camp*, 397 U.S. 150	35
Bailey v. *Patterson*, 369 U.S. 31	40
Baker v. *Carr*, 369 U.S. 186	14, 35, 41
Barlow v. *Collins*, 397 U.S. 159	16, 38
Barrows v. *Jackson*, 346 U.S. 249	19
Boyle v. *Landry*, 401 U.S. 77	27
Brown & Root, Inc. v. *Big Rock Corporation*, 383 F. 2d 662	18
Communist Party of the U.S. v. *Subversive Activities Board*, 367 U.S. 1	23
Danville Tobacco Association v. *Freeman*, 351 F. 2d 832	35
Davis v. *Ichord*, 442 F. 2d 1207	18, 20, 24, 26, 28, 39, 41
Dombrowski v. *Pfister*, 380 U.S. 479	15, 20, 24, 25, 36
Dyson v. *Stein*, 401 U.S. 200	27
Flast v. *Cohen*, 392 U.S. 83	14, 15, 16, 17, 19, 21, 23, 25, 35, 38, 39
Frothingham v. *Mellon*, 262 U.S. 447	22, 25
Garcia v. *Brownell*, 236 F. 2d 356	18
Golden v. *Zwickler*, 394 U.S. 103	23, 24, 26–27
Hardin v. *Kentucky Utilities Co.*, 390 U.S. 1	38
Hentoff v. *Ichord*, 318 F. Supp. 1175	15, 20, 24, 41
Investment Co. Institute v. *Camp*, 401 U.S. 617	38
Kansas City, Mo. v. *Williams*, 205 F. 2d 47, certiorari denied, 346 U.S. 826	40
Lamont v. *Postmaster General*, 381 U.S. 301	24, 41
Lampkin v. *Connor*, 360 F. 2d 505	18, 28
Levitt, Ex parte, 302 U.S. 633	38
Local 309, United Furniture Workers of America v. *Gates*, 75 F. Supp. 620	40

Cases—Continued

	Page
Maryland Casualty Co. v. *Pacific Co.*, 312 U.S. 270	27
Missouri, Kansas & Texas Ry. Co. v. *May*, 194 U.S. 267	23, 30
NAACP v. *Alabama*, 357 U.S. 449	24, 36
NAACP v. *Button*, 371 U.S. 415	24
National Student Association v. *Hershey*, 412 F. 2d 1103	21, 22, 24, 25, 26, 27, 29
Office of Communication of United Church of Christ v. *Federal Communications Commission*, 359 F. 2d 994	37
Perez v. *Ledesma*, 401 U.S. 82	27
Pierce v. *Society of Sisters*, 268 U.S. 510	36
Reed Enterprises v. *Corcoran*, 354 F. 2d 519	25
Samuels v. *Mackey*, 401 U.S. 66	27
Scenic Hudson Preservation Conf. v. *Federal Power Commission*, 354 F. 2d 608	37
Shelton v. *Tucker*, 364 U.S. 479	41
Sweezy v. *New Hampshire*, 354 U.S. 234	24
Talley v. *California*, 362 U.S. 60	24
Troutman v. *Shriver*, 417 F. 2d 171, certiorari denied, 397 U.S. 923	40
United Public Workers v. *Mitchell*, 330 U.S. 75	18, 21, 23, 27, 28
United States v. *Butler*, 297 U.S. 1	23, 30
United States v. *Fruehauf*, 365 U.S. 146	18
United States v. *McLeod*, 385 F. 2d 734	20
United States v. *Robel*, 389 U.S. 258	15, 20, 24
Velvel v. *Nixon*, 415 F. 2d 236, certiorari denied, 396 U.S. 1042	40
Watkins v. *Chicago Housing Authority*, 406 F. 2d 1234	40
Watkins v. *United States*, 354 U.S. 178	24
Watson v. *Buck*, 313 U.S. 387	22
Younger v. *Harris*, 401 U.S. 37	27, 28

Constitution, statutes and regulations:
United States Constitution:
Page
Article III, Sec. 2 ..... 1, 14, 17, 19, 23, 28
First Amendment 1, 3, 4, 13, 15, 21, 23, 25, 27, 28, 35
Fourth Amendment 3
Fifth Amendment 3
Ninth Amendment 3
Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1), Section 701(f)(1) 38
Federal Power Act, 16 U.S.C. 821 1(b), Section 313(b) 38
Interstate Commerce Act, 49 U.S.C. 1(20), Section 1(20) 38
Public Utility Holding Company Act of 1935, 15 U.S.C. 79x(a), Section 24(a) 38
Securities Act of 1933, 15 U.S.C. 77i(a), Section 9(a) 38
10 U.S.C. 331 ..... 2, 30, 31
10 U.S.C. 332 ..... 2, 30, 31
10 U.S.C. 333 ..... 2, 30, 31
32 C.F.R. 187.1 *et seq* 30
32 C.F.R. 187.6 31
Department of Defense Directive No. 3025.12 (June 8, 1968) 30, 31
Miscellaneous:
117 Cong. Rec. S. 985 (daily ed., February 8, 1971) 34
C. Wright, *Federal Courts* 34 (1963) 18, 29
Disorders—1968, General Adjustment Bureau, Inc. (1969) 9
Executive Orders (3 C.F.R. (1968 Comp.) 107–110):
No. 11403 (April 5, 1968) 30
No. 11404 (April 7, 1968) 30
No. 11405 (April 7, 1968) 30

Miscellaneous—Continued

	Page
1 Farrand, *The Records of the Federal Convention of 1787* (1911)	29
2 Farrand, *The Records of the Federal Convention of 1787* (1911)	29
Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255	37
Report, National Advisory Commission on Civil Disorders, p. 269 (Supp. 1968)	6, 32
Reports, Brandeis University Lemberg Center for Study of Violence (1969)	9
Riot and/or Civil Commotion Report, American Insurance Association (1969)	9
U.S. News and World Report, September 2, 1968	6

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ARLO TATUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals (App. 129–155) [1] are reported at 444 F. 2d 947. The order of the district court and its "Findings of Fact and Conclusions of Law" (App. 126–127) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1971 (App. 129). Mr. Justice Black extended the time within which to file a petition for a

[1] "App." references are to the printed Appendix filed by the parties in this Court.

writ of certiorari to August 25, 1971. The petition was filed on that date; it was granted on November 16, 1971 (App. 156). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondents' claim—that the mere existence of a civil disturbance intelligence system within the Department of the Army generates a chilling effect on the exercise, by persons other than plaintiffs, of First Amendment rights—is justiciable, and is one that these respondents have standing to raise.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides in relevant part:

> SECTION 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *—to Controversies to which the United States shall be a party; * * *

The First Amendment of the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech * * *; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sections 331, 332 and 333 of Title 10, United States Code, are set forth in Appendix A, *infra*, at pp. 43–44.

STATEMENT

Respondents, on behalf of themselves and others, commenced this class action in the United States District Court for the District of Columbia, challenging certain intelligence-gathering operations of the Department of the Army, insofar as they related to surveillances of "lawful political activity" (App. 8), as beyond legitimate military needs and as an indirect infringement of their constitutional rights guaranteed by the First, Fourth, Fifth and Ninth Amendments. They sought a declaratory judgment that this domestic surveillance activity of the Army is unconstitutional or otherwise illegal, preliminary and permanent injunctions forbidding all such activity in the future, and a mandatory injunction ordering the Army to turn over to the court for destruction all information obtained by such intelligence work which it then had on hand (App. 11–12). On April 29, 1970, the district court, pursuant to the government's motion (App. 73), dismissed the complaint on jurisdictional grounds and denied respondents' request for a preliminary injunction (App. 126–127). A divided court of appeals reversed and remanded the case to the district court for further proceedings on the merits (App. 129–155).

1. The respondents in this case are four individuals [2]

[2] Arlo Tatum, Executive Secretary of the Central Committee for Conscientous Objectors; Conrad Lynn, "a black attorney admitted to practice before the New York State Court of Appeals"; Rev. Albert B. Cleage, Jr., Minister of the Shrine of the Black Madonna, Detroit, Michigan; Benjamin N. Wyatt, Jr., "a black attorney admitted to practice in the State of California" (App. 6–7).

453-299—71——2

and nine unincorporated associations.[3] They instituted the present suit against the Secretary of Defense, the Secretary and Chief of Staff of the Army and the Commanding General, U.S. Army Intelligence Command (App. 8), on their own behalf "and on behalf of all other individuals and organizations who wish to exercise their right under the First Amendment of the United States Constitution to engage in peaceful political protest, demonstrations, marches, rallies, church meetings and other forms of constitutionally protected expression and assemblies without surveillance by defendants' agents and without becoming the subject of dossiers, reports, and files * * *" (App. 8).

2. The surveillance activity complained of essentially "began in the summer of 1965" (App. 23);[4] "its purpose was to provide early warning of civil disorders which the Army might be called upon to quell" (*ibid*). Approximately "1,000 plainclothes investi-

[3] Women Strike for Peace; Chicago Area Women for Peace; The Vietnam Week Committee of the University of Pennsylvania; The Vietnam Education Group (Knoxville, Tennessee); Veterans for Peace in Vietnam; The American Federation of State, County and Municipal Employees; The Vietnam Moratorium Committee; Clergy and Laymen Concerned About Vietman; War Resisters League (App. 6–7).

[4] The Statement is based essentially on the article by Mr. Pyle, attachments to affidavits and memoranda filed by respondents in support of their motion for a preliminary injunction, and affidavits filed by petitioners in support of their motion to dismiss. Although the accuracy of petitioners' affidavits has not been conceded, respondents have made no specific allegation that they are inaccurate.

gators, working out of some 300 offices from coast to coast" (App. 23, 52), were assigned the task of attending, and reporting on, selected public gatherings and civilian demonstrations across the country that were thought to have a potential for civil disorder (App. 13–21, 52, 69). Such assignments were "separate and apart from" (App. 79) the agents' regular security-clearance investigations relating to "whether uniformed members of the Army, civilian employees and contractors' employees should be granted access to classified information" (App. 52, 76–77, 83), a task—not in any way involved in the present litigation—that accounted for at least "94% of the time of Intelligence Command field personnel" (App. 52) throughout the period here in question.

a. *Surveillance.* In July 1967, civil disturbances in Detroit, Michigan, erupted into widespread disorder and federal troops were called in to assist the local authorities (App. 87). As a result of that experience, "the Army initiated a comprehensive review of civil disturbance plans, training and operations,"[5] which culminated in "the development of a detailed family of contingency plans for operations in support of local authorities" (*ibid*). As the use of federal troops to quell civil disturbances increased throughout the Fall

[5] The Army at that time had a general contingency plan for assisting local authorities to quell civil disturbances, but it was felt that something more specific was needed to coordinate the efforts of the federal government in this area with state and local authorities (App. 87–88).

of 1967 and into the Spring of 1968 (App. 54, 97),[6] so, too, did the Army's domestic surveillance activities (App. 23, 54). Because of the need for "the Department of the Army [to] keep itself informed in advance as to potential situations where troops may be necessary" (App. 71), the attendance of military intelligence agents at public gatherings that portended possible civil disorder became more frequent (App. 13–21).

The efforts of these Army personnel were directed "primarily at ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act" (App. 70).[7] For example, it was relevant for planning purposes to determine which cities had a

[6] As the majority of the court of appeals pointed out (App. 136): "During the period 1967–1968 the National Guard was called upon eighty-three times and the Army four times to quell cases of civil disorder." In the month of April 1968 alone, following the assassination of Dr. Martin Luther King, Jr. (App. 91–97, 103–108), there were 237 civil disorders, 27,000 arrests, 43 deaths, over 58 million dollars in property damage, and over 58,000 federal troops who were used 25 times to quell civil disturbances. *U.S. News and World Report*, September 2, 1968, p. 68.

[7] As the court of appeals observed (App. 136–137), when the Army is called upon to assist local authorities it is acting essentially as "a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman." And see *Report, National Advisory Commission on Civil Disorders*, p. 269 (Supp. March 1, 1968).

high potential for violence (App. 71), which issues appeared to be the more volatile, and which speakers were most likely to excite a crowd to action (App. 13–21, 84). Also important was some assessment of the ability of local authorities to control civil disorders, including an appraisal of what size demonstration they could handle on their own (App. 90). In addition, some intelligence information was needed simply to alert the Army as to how and where to deploy troops within particular cities if it became necessary to use them (App. 70–71).

b. *Reports and files.* To the extent that these data came from the Army's domestic surveillance activity at public gatherings,[8] they were forwarded by teletype to the Intelligence Command (App. 54) in what were called "spot reports" (App. 80, 85). Representative samples of such reports are set forth at App. 13–21. They contain essentially the time and place of the demonstration under observation, its purpose, the size of the crowd and the identity of organizers, speakers or principal participants,[9] and a comment on whether the crowd dispersed peacefully or the demonstration ended in civil disorder (*ibid.*).

---

[8] There are no allegations that the Army has conducted surveillance of wholly private activity (App. 137–138, 149 n. 2). Moreover, as the affidavits filed in this case show (App. 71), "the overwhelming bulk" (App. 71) of intelligence information relating to the Army's civil disturbance mission was obtained "from the FBI and state and local police agencies" (App. 54; and see *id.* at 23).

[9] "The record shows that most if not all of the [respondents] and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records" (App. 140 n. 17).

In 1967 and 1968, this intelligence information was stored by the Army in a special civil disturbance computer data bank located at Fort Holabird, Maryland (App. 52, 55, 69).[10] In addition, the names and descriptions of those individuals and organizations contained in the "spot reports" were placed on a separate "identification list" (App. 54, 71), which was distributed to Army field agencies.[11] The reports themselves were then "routinely destroyed" (App. 80), generally within 60 days of the date of receipt (App. 72, 85).

Respondents do not allege that the Army had misused this intelligence data, and the court of appeals, although divided on other points, essentially agreed

---

[10] Fort Holabird was the headquarters of the U.S. Army Intelligence Command (App. 52); the official designation of the office was "CONUS Intelligence Branch," which was the Army's acronym for Continental United States Intelligence Branch (App. 26).

[11] Both the civil disturbance computer data bank and the special identification list were kept apart from the U.S. Army Investigative Records Repository (USAIRR) (App. 79), which "was established to serve as a central filing system for all security and criminal investigations" (App. 83) of Army personnel, civilian employees and contractors' employees (App. 77). The USAIRR contains approximately 7 million files relating to these types of investigations (App. 77, 83); some of the older files are on microfilm (App. 83). To the extent that any of the information in these files can be traced to the Army's civilian surveillance activity, that information is now being removed from USAIRR and destroyed. Primarily because of the size of USAIRR, the Secretary of Defense directed in May 1965 that "a central index of all security investigations conducted by Department of Defense agencies be established" (App. 53). It is called the Defense Central Index of Investigations and does not directly reflect the civil disturbance information that was collected by the Army.

that "[i]n the instant complaint there are no allegations or claims that any information gathered by the Army has been used in a manner that has injured [respondents] or imposed on them any penalty attributable to their exercise of their First Amendment rights." (App. 151, and see *id.* at 139).

3. Civil disorders reached their peak in the Spring and Summer of 1968.[12] Thereafter, as the level of turbulence abated, and the need to maintain federal troops on civil disturbance alert declined, the Army reexamined its domestic intelligence system; as a result, this type of surveillance activity decreased (App. 79–80, 82, 84).

The affidavits in this case show (App. 54–55, 80, 85) that the number of public demonstrations attended by military investigators was systemmatically reduced (App. 54, 82). Observation of civilian political activities became "limited to incidents where there [was] a high potential for violence and disorder growing beyond the capability of state and local police and the National Guard to control" (App. 85). While "spot reports" were for a time still prepared by field personnel and forwarded to Intelligence Command, this practice was severely restricted in June 1970 (see Appendix B, *infra,* pp. 45–52).[13] The

[12] See, *e.g.*, *Reports*, Brandeis University Lemberg Center for Study of Violence (1969); *Disorders—1968*, General Adjustment Bureau, Inc. (1969); *Riot and/or Civil Commotion Report*, American Insurance Association (1969).

[13] In the court below, the government mistakenly referred to this document by the date of March 6, 1970 (App. 146). The directive of that date related only to the destruction of computer data banks (see Appendix C, *infra*, pp. 53–54).

new policy prohibited any transfer of information to a computer data bank (App. 80); an identification list was no longer compiled and maintained (App. 55, 81). Any "spot reports" that had been prepared had to be "destroyed 60 days after publication or 60 days after the end of the disturbance" (App. 80).[14]

In addition to placing these restrictions on current intelligence activity, the military undertook a review of the civil disturbance information collected in the pre-1969 period. It "determined that certain records maintained by the Army were not useful and were not necessary in view of the Army's [civil disturbance] mission" (App. 71). Accordingly, on February 19, 1970, the Assistant Chief of Staff for Intelligence ordered the computer data bank at Fort Holabird to be destroyed (App. 55, 80, 84), and this destruction has been completed.[15] Almost simultaneously, an order went out to the Army field agencies to return to Intelligence Command all copies of the identification list; they too were destroyed (App. 54, 55, 71–72, 81, 84, 86). "[O]ne copy of the identification list and one print out of the bulk of the information in the data

---

[14] By direction of the Under Secretary of the Army, one copy of each "spot report" in existence at the time this case was commenced, or prepared thereafter, is to be "retained as long as is necessary in connection with the *Tatum* suit" (App. 72).

[15] Similarly, two other smaller civil disturbance computer data banks at Fort Hood, Texas, and Fort Monroe, Virginia, were also destroyed. The establishment or operation by the Army of any computer data banks relating to civilians or civilian activity is now prohibited without the prior approval of the Chief of Staff and the Secretary of the Army (App. 55, 80, 84–85).

bank" are being retained solely for purposes of the present litigation (App. 72).[16]

4. In early January 1970, an article entitled "CONUS Intelligence: The Army Watches Civilian Politics" appeared in the magazine *The Washington Monthly* (App. 10, 46). Written by Christopher H. Pyle, a former Captain in Army Intelligence who had served as an instructor in the United States Army Intelligence school while in the service, the article (App. 22–43) gave the author's views on what he believed to be the nature and scope of the domestic surveillance activity of Intelligence Command during the 1967–1968 period.[17] Particular attention was devoted to the military's compilation of an identification list, described as a "blacklist" (App. 25), bearing names of private citizens and organizations, and to what the author thought were future plans to establish a civil disturbance "computerized data bank"

[16] A print out of the information in the data banks at Fort Hood and Fort Monroe was also retained in connection with this case. The only other "intelligence files" which the Army has concerning civil disturbances are maintained by the Counterintelligence Analysis Division (App. 85). The information in those files, some of which is stored on microfilm, at one time contained a limited amount of material relating to the Army's civil disturbance mission, most of which had been "received from the FBI and collated in order to permit evaluation" of factors bearing on civil disturbance potential (*ibid.*). We are advised, however, that all such materials have now been eliminated from these "intelligence files"; any information received hereafter by the Counterintelligence Analysis Division relating to the Army's civil disturbance mission must be destroyed within 60 days of receipt.

[17] Mr. Pyle was released from active duty on July 30, 1968 before the Army reexamined its domestic surveillance activity.

(*ibid.*); he was apparently unaware that one had been in existence for some time. In the final portion of the article, under the heading "What Can Be Done," the author stated (App. 39): "An obvious first step is a court challenge of the Army's authority to possess information for which it has no substantial need."

Respondents commenced the present class action on February 17, 1970, relying heavily on Mr Pyle's article (App. 9–10). The district court denied a preliminary motion for a temporary restraining order to halt all current intelligence activity of the Army of the type set forth in the complaint. The government then moved on affidavits to dismiss the complaint on the ground, *inter alia*, that there existed "no justiciable issue, case or controversy and no basis for the granting of equitable, declaratory or other relief" (App. 73).

Following a hearing, the district court dismissed the complaint and denied the respondents' request for preliminary injunctive relief. It ruled (App. 126) that "what in effect the [respondents] are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in this country and magazines." This, in the court's view, failed to state a cause of action. It held that "[respondents] * * * show no unconstitutional action and allege no unlawful action on the part of the [petitioners, and] show no threats to their rights and present no justiciable controversy" (App. 128).

An appeal was taken to the court of appeals, and a divided panel of that court reversed (App. 129–155). The majority concluded that, "[b]ecause the evil alleged in the Army intelligence system is that of overbreadth, *i.e.*, the collection of information not reasonably relevant to the Army's mission to suppress civil disorder, and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time" (App. 142; footnote omitted).

Judge MacKinnon, while concurring "in many of the pronouncements in the majority opinion" (App. 148), dissented on the ground that respondents' "indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding, do not present a case involving facts of sufficient realism and definiteness to confer jurisdiction on the court to making a sweeping constitutional decision affecting important activities of the federal Government" (App. 152).

SUMMARY OF ARGUMENT

This case presents only the threshold question whether these particular respondents can challenge in court the existence of a federal program which admittedly causes them no injury or threat of injury, but allegedly generates a chill on First Amendment rights of millions of other Americans. Our position is that such a claim lacks sufficient focus and con-

creteness to present the constitutional issue in an "adversary context" (*Flast* v. *Cohen*, 392 U.S. 83, 95) as required by the "Case" or "Controversy" language in Article III of the Constitution. In addition, we argue that the named respondents, who readily admit that they are themselves insulated from any chilling effect, have no standing to maintain the present suit as "private attorneys general" on behalf of other members of the public at large.

A. While we recognize that the concept of justiciability has undergone significant expansion in recent years, we do not believe its contours yet require the courts to take cognizance of a "generalized grievance" (*Flast* v. *Cohen, supra,* 392 U.S. at 106) based upon the mere existence of a government program thought by respondents to be perhaps overbroad, although, by their own admission (App. 151), having both a scope and purpose of "unknown" dimensions. The role of the Judiciary in our system of government is confined by the Constitution to the adjudication of "Cases" or "Controversies." Traditionally this has been construed to mean that constitutional issues are subject to judicial review only when presented with "concrete adverseness" (*Baker* v. *Carr*, 369 U.S. 186, 204), in the context of a clearly defined controversy between persons asserting specific, identifiable and conflicting interests.

Consistent with this principle, grounded in substantial part on the separation of powers prescribed by the Constitution, federal courts have in recent

years, when confronted by a claim of injury based upon an alleged chilling effect on First Amendment rights, looked for something more specific than an abstract and ill-defined objection to the mere existence of government conduct. The judicial focus in this area, as in all others, has been the impact of particularized governmental action on the rights of an ascertainable individual or group. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479; *United States* v. *Robel,* 389 U.S. 258; *Hentoff* v. *Ichord,* 318 F. Supp. 1175.

In the instant case, these elements of particularity are not present. The chill that is allegedly generated not on these respondents, but on "millions of Americans," derives solely from the existence of an Army domestic surveillance system, which, as the majority opinion below points out, gathers certain information in connection with the military's recognized civil disturbance mission that is essentially no different from what "a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand" (App. 138). Such a claim, we submit, presents no more than "[a] generalized grievance about the conduct of government" (*Flast* v. *Cohen, supra,* 392 U.S. at 106). As such, it is insufficient to confer jurisdiction on the courts to decide sweeping constitutional issues affecting important activities of the federal government.

B. Nor do these respondents have standing to raise a constitutional challenge to the Army's domestic intelli-

gence operation. They admit that they "are *not people, obviously, who are cowed and chilled*" (App. 148; emphasis in original) by the surveillance activity involved here. Instead, they come before this Court as self-appointed "private attorneys general" on behalf of "millions of Americans not nearly as forward, as courageous, as willing as them to open themselves up to public investigation and public scrutiny" (*ibid*).

Whatever may be the limits of "public interest" standing—a concept that has been significantly expanded in recent years by Congress—we do not believe it yet permits one to gain access to the courts to air his personal protest against some governmental program merely on the basis of a generalized claim of chill on "millions of Americans." Some "logical nexus between the status asserted [by the litigant] and the claim sought to be adjudicated" is still required (*Flast* v. *Cohen, supra*, 392 U.S. at 102). Even when suing in the self-appointed capacity of private attorneys general, respondents must represent something more than a general interest common to the public at large. The group that feels an official breath of cold air on their First Amendment rights must be identifiable by some "distinctive and discriminating harm" (*Barlow* v. *Collins*, 397 U.S. 159, 172 n. 5; Brennan J., concurring and dissenting) that sets it apart from the general citizenry. But, no such trademark of distinctive injury identifies a specific class in this case. This, we submit, is fatal to respondents' claim.

ARGUMENT

A CLAIM THAT THE FIRST AMENDMENT RIGHTS OF OTHERS ARE CHILLED, DUE TO THE MERE EXISTENCE OF ARMY SURVEILLANCE ACTIVITY AT PUBLIC GATHERINGS, DOES NOT ESTABLISH A JUSTICIABLE CONTROVERSY, AND IS NOT A CLAIM THAT THESE RESPONDENTS HAVE STANDING TO RAISE

The constitutional limitation on judicial power of Article III courts, defined only in terms of "Cases" or "Controversies," has evolved within a framework of "justiciability," with respect to the issues raised, and "standing," with respect to the parties raising them. These concepts describe the minimal jurisdictional standards that must be satisfied for a claim to be cognizable in the federal courts. See *Flast* v. *Cohen*, 392 U.S. 893, 94–106.

In the instant case, the respondents seek to enjoin all military domestic surveillance activity relating to the Army's civil disturbance mission on the ground that the very existence of such an intelligence system, whatever its dimensions, generates a chill on others, whomever and wherever they may be, who might wish to attend public demonstrations free from such surveillance. Their claim, we submit, expands traditional notions of justiciability and standing beyond anything that the federal courts hitherto have recognized, even after the judicial expansion in this area in recent years. Sound practical and policy considerations, as well as constitutional doctrine, indicate that such a

further relaxation of these jurisdictional requirements should not be made.[18]

A. RESPONDENTS' COMPLAINT DOES NOT STATE ANY JUSTICIABLE ISSUE

1. "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, *Federal Courts* 34 (1963). "[S]uch advance expressions of legal judgment upon issues which remain unfocused" have long been considered inappropriate; for, the differing positions cannot be "pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States* v. *Fruehauf*, 365 U.S. 146, 157. Thus, as this Court observed in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89: "For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." See *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461, and cases cited.[19]

---

[18] Since the relief that respondents seek is equitable, considerable deference should be accorded to the determination of the district court that the claim is not ripe for adjudication.

[19] See also *Davis* v. *Ichord*, 442 F. 2d 1207, 1212 (C.A.D.C.); *Lampkin* v. *Connor*, 360 F. 2d 505, 507 (C.A.D.C.); *Garcia* v. *Brownell*, 236 F. 2d 356, 357–358 (C.A. 9); *Brown & Root, Inc.* v. *Big Rock Corporation*, 383 F. 2d 662, 666 (C.A. 5); *American Dietaids Co.* v. *Celebrezze*, 317 F. 2d 658, 660 (C.A. 2).

The rationale for this requirement of ripeness "has become a blend of constitutional requirements and policy considerations" (*Flast* v. *Cohen*, 392 U.S. 83, 97), which are "not always clearly distinguished" (*Barrows* v. *Jackson*, 346 U.S. 249, 255). They are, however, grounded on a "dual limitation placed upon federal courts by the case-and-controversy doctrine" embodied in Article III to the Constitution (*Flast* v. *Cohen*, *supra*, 392 U.S. at 95):

> In part those words ["'cases' and 'controversies'"] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government * * *.

Treating the claim presented in the instant case as ripe for adjudication would depart from those fundamental principles. Although the complaint alleges overbreadth, the challenge here is really to the very existence of domestic surveillance activity by the Department of the Army. The respondents seek to enjoin all surveillance of "lawful political activity" (App. 8, 11–12); since it is impossible to observe lawful activity becoming unlawful (as when a public meeting becomes riotous), without observing the lawful activity, a prohibition on surveillance of "lawful political activity" (App. 8) would actually be a ban on all surveillance of the kind involved here.

The grounds for such relief are based on the broadest

of generalities. The complaint states (App. 10) that "[t]he purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate [respondents] and other similarly situated * * *." Yet, they are unable to point to a single instance of harassment or intimidation. Compare *Dombrowski* v. *Pfister*, 380 U.S. 479.[20] Respondents allege generally an invasion of their privacy, damage to their reputations and an adverse effect on their employment and their opportunities therefor (App. 10), but they cite no specific examples. Compare *United States* v. *Robel*, 389 U.S. 258. The Army's domestic surveillance system, the complaint further states (App. 10–11), will "cast a pall over lawful political protest in the United States and * * * deter [respondents] and other [*sic*] similarly situated from exercising their First Amendment rights for fear * * * that all of this information [collected by such Army surveillance activity] will be released to numerous federal and state agencies." As the court of appeals pointed out (App. 139), however, plaintiffs "do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground." Compare *Davis* v. *Ichord*, 442 F. 2d 1207 (C.A.D.C.); *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C.).

Such allegations, which the dissent below accurately characterized as "indefinite claims of highly visionary

[20] See also *United States* v. *McLeod*, 385 F. 2d 734 (C.A. 5), where the court was faced with a plausible claim that the purpose of police surveillance at public gatherings was to intimidate and coerce Negro voters.

apprehensions" (App. 152), do not, we submit, present the issue of the constitutionality of the Army's civil disturbance intelligence operations "in an adversary context" (*Flast* v. *Cohen, supra*, 392 U.S. at 95); they do not have the concreteness and sufficiency of focus to make the claims justiciable. There is no assertion here that the activity complained of has caused direct injury to these plaintiffs or others similarly situated. In the words of the court of appeals (App. 137–138):

> [Plaintiffs] freely admit that they complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies. There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent. *So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.* (Emphasis added.)

2. Respondents' claim, that the mere existence of such an intelligence operation generates a chill on the exercise of First Amendment rights of others who wish to attend public gatherings without being observed by Army personnel, is not enough itself to satisfy the requirement of justiciability. This is the import of *United Public Workers* v. *Mitchell, supra*. There, as noted by the court below in *National Student Association* v. *Hershey*, 412 F. 2d 1103, 1114, federal employees challenging the Hatch Act "had plausi-

bly complained of a veritable freezing effect on some of their political activities, which lie at the very core of the First Amendment's intended protection." In holding that their claims were nonjusticiable, this Court stated (330 U.S. at 91): "No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and regulations."

It has, of course, long been recognized that the mere existence of a statute, regulation or articulated policy, even if the latter apparently is facially invalid, is not alone adequate basis for judicial intervention. See, *e.g., Alabama State Federation of Labor* v. *McAdory, supra*; *Watson* v. *Buck,* 313 U.S. 387; *National Student Association* v. *Hershey, supra,* 412 F. 2d at 1110. Courts "have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional." *Frothingham* v. *Mellon,* 262 U.S. 447, 488. The same rule is applicable to other types of governmental action. The courts are not a banc of grand censors of governmental policy. Their important function is narrower in scope, to decide actual controversies brought before them by parties truly affected by governmental action. Ours is a system of separated powers. "To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly before the courts" (*ibid.*) Those who enact and implement the laws are no less sworn than those who adjudicate legal rights under them to uphold the Constitution of

the United States. *Missouri, Kansas & Texas Ry Co.* v. *May,* 194 U.S. 267, 270; see also *United States* v. *Butler,* 297 U.S. 1, 87 (Stone, Brandeis and Cardozo, JJ., dissenting).

The "Case" and "Controversy" language in Article III provides a purposeful and effective limitation on the judicial function; it "implements the separation of powers prescribed by the Constitution * * *." *Flast* v. *Cohen,* 392 U.S. at 96; *Communist Party of the United States* v. *Subversive Activities Board,* 367 US. 1, 71–72. Action by the President and the Congress, whether touching on First Amendment rights or otherwise, is subject to judicial scrutiny only when "presented in the context of a specific, live grievance." *Golden* v. *Zwickler,* 394 U.S. 103, 110. Federal courts have not been given a roving commission to inquire generally into activities of the two other Branches of the Government. To the contrary, "[i]t would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interference upon the other." *United Public Workers* v. *Mitchell, supra,* 330 U.S. at 90.

Viewed in this context, respondents' formalistic claim of chilling effect is not ripe for determination. All that is before the Court is a general objection to the "*present existence*" (App. 139; emphasis in original) of government activity, purportedly overbroad in scope, because of its alleged chilling effect on other (and undesignated) members of the public at large.

There is no specific threat or imposition of legal or criminal sanctions directed against an ascertainable individual or group.[21] Missing also is any allegation that these individual plaintiffs, or members of the complaining associations, have been compelled to disclose political beliefs or ideas.[22] And respondents admit that this is not a case based on the past misuse of collected information (App. 151), or any threat to them of future publication by the Army (App. 139). Compare *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D. D.C.).[23]

---

[21] Compare, *e.g.*, *United States* v. *Robel*, 389 U.S. 258 (criminal prosecution or loss of employment); *Dombrowski* v. *Pfister*, 380 U.S. 479 (criminal prosecution); *NAACP* v. *Button*, 371 U.S. 415 (criminal prosecution, disbarment); *National Student Association* v. *Hershey*, *supra* (draft reclassification).

[22] Compare, *e.g.*, *Lamont* v. *Postmaster General*, 381 U.S. 301 (compelling an affirmative request for mail held by the Post Office as communist propaganda); *Talley* v. *California*, 362 U.S. 60 (requiring identity on political handbills); *NAACP* v. *Alabama*, 357 U.S. 449 (requiring filing of membership lists); *Sweezy* v. *New Hampshire*, 354 U.S. 234, and *Watkins* v. *United States*, 354 U.S. 178 (compelling testimony).

[23] Even if respondents' suit were grounded on the fear of future misuse of the information in the hands of the Army, it would suffer from the lack of "sufficient immediacy and reality." *Golden* v. *Zwickler*, *supra*, 394 U.S. at 108, 110; *Davis* v. *Ichord*, *supra*, 442 F.2d 1215–1216. As we have pointed out (*supra* pp. 10–11), except for copies or print outs retained solely for purposes of this litigation, the computer data banks and identification lists have been destroyed. As the dissent below observed (App. 152): "There is nothing more here than a highly abstract claim based on an imaginary fear that governmental power to collect information for a valid purpose will be misused for an *improper* purpose. Similar fears might exist with respect to any government power. All power is susceptible of misuse, but that truism when coupled with unfounded fear alone is not sufficient to make out a case for judicial jurisdiction" (emphasis in original).

Contrary to the conclusion of the court of appeals (App. 138–141), this case is thus fundamentally different from the other cases in which federal courts have entertained claims based upon a chill to First Amendment rights. In each of those instances, there was "the beneficial focus afforded by adversary argument trained upon a factual dispute." *National Student Association* v. *Hershey, supra,* 412 F. 2d at 1114–1115. Here, by contrast, the rights sought to be vindicated are those of the general public, or at least of all members of the public who are politically active. Cf. *Frothingham* v. *Mellon, supra,* 262 U.S. at 488; *Flast* v. *Cohen, supra,* 392 U.S. at 106. That, we submit, is not enough.

To be sure, "a plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." *National Student Association* v. *Hershey, supra,* 412 F. 2d at 1110 and n. 19; *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519, 523–524 (C.A. D.C.). But, a judicial forum should not be made available to anyone who makes an allegation of general injury to the public (though not to himself) as a basis for protesting the existence of federal programs to which he may personally object. The proper focus of the judicial function always has been upon the actual impact of particularized government action on the rights of an ascertainable individual or group. There is nothing in the chilling effect doctrine, that alters this perspective. See, *e.g., Dombrowski* v. *Pfister, supra.* Indeed, precisely because an injury in the form of chilling effect

is by nature indirect, the frame of reference in that area should remain narrow in the traditional sense. For, "[t]o permit adjudication of a legal question or dispute solely on account of its chill is in effect to concede that the substantive issues, apart from the chill are themselves not ripe for adjudication." *National Student Association* v. *Hershey, supra,* 412 F. 2d at 1114–1115.

Here, those factors going beyond the "mere existence" of a statute, regulation or articulated policy, which the federal courts have heretofore looked to as generating a particular chill on identifiable plaintiffs, are absent. The constitutional issue in this case remains unfocussed; it is clouded further by admitted subtleties described by respondents below (App. 151) as "a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the [Army's] civilian intelligence network" (emphasis in original). In these circumstances, we do not believe "there exists a controversy between the parties with such immediacy and presently adversary character as to require its adjudication." *Davis* v. *Ichord, supra,* 442 F. 2d at 1211;[24] see also *Golden* v. *Zwickler,*

[24] The majority in the instant case distinguished *Davis* on the ground that the "source of the chill" in *Davis* was not the Army, but was a civilian investigative agency. Where the investigation or surveillance is performed by the military, it concluded (App. 145), there is a greater likelihood that the surveillance activity will have a "chilling effect," since "the military is not accustomed to operating within the restrictions of the law and the processes of the courts." Even if that statement were sound, however—and we think it is not—the argument sug-

supra, 394 U.S. 108, 110; *Maryland Casualty Co.* v. *Pacific Co.*, 312 U.S. 270, 273.

If, as the court below stated in *National Student Association* v. *Hershey, supra*, 412 F. 2d at 1111, this Court in *United Public Workers* v. *Mitchel, supra*, "spread the justiciability question along a continuum ranging between 'a general threat by officials to enforce those laws which they are charged to administer' and 'a direct threat of punishment against a named [party] * * * for a completed act,'" the instant case, must be placed near the "general" pole of non-justiciability. It is, we think, no more ripe for judicial determination than were the claims of chill based on a decision by the State of California to prosecute under its Criminal Syndicalism Act, which this Court declined to entertain last Term in *Younger* v. *Harris*, 401 U.S. 37, 42. See also *Samuels* v. *Mackey*, 401 U.S. 66; *Boyle* v. *Landry*, 401 U.S. 77; *Dyson* v. *Stein*, 401 U.S. 200; compare *Perez* v. *Ledesma*, 401 U.S. 82.

Admittedly, as the court below noted (App. 139–141 n. 17), this Court's abstention from reviewing the First Amendment claims in *Younger* and the related cases rested on principles of federalism. But that does not make those decisions wholly inapposite here. It is no more appropriate for the federal courts to interfere with the actions of the Executive or Legislative

---

gests that the proper course is to await a case presenting concrete evidence of unlawful inhibitory action by the military, or a real threat of misuse of information; the issues should not now be adjudicated in a case which presents only abstract legal issues involving, at best, the speculative impairment of constitutional rights.

Branches in the absence of a clearly defined controversy between parties asserting specific, identifiable, and conflicting interests (see *United Public Workers* v. *Mitchell, supra,* 330 U.S. at 90–91) than for them to intercede prematurely in state matters when presented only with claims grounded in "imaginary [and] speculative" fears (*Younger* v. *Harris, supra,* 401 U.S. at 42). When the federal judicial power is invoked under the "Cases" or "Controversies" language in Article III, considerations not unlike those that sustain the requirements of federalism, require more than the vague assertions made in this case, which, as accurately noted by the dissent below (App. 152), involve at best "indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding * * *." See, *e.g., Davis* v. *Ichord, supra; Lampkin* v. *Connor,* 360 F. 2d 505 (C.A.D.C.); *American Dietaids Co.* v. *Celebrezze,* 317 F. 2d 658 (C.A. 2).

3. Indeed, if the judicial power may be invoked by a claim that First Amendment rights of other members of the general public will be chilled by the mere existence of a federal program of "unknown" scope or purpose, it is difficult to see where the line of justiciability can be drawn. May not some members of the public feel an official breath of cold air from the mere existence of the Secret Service, the Federal Bureau of Investigation and other law enforcement agencies, for example? "In view of the range of statutes, regulations and policies which arguably chill

protected expression" (*National Student Association* v. *Hershey, supra,* 412 F. 2d at 1114), treating the present claim as justiciable would, in essence, "convert the courts into de facto Councils of Revision over a substantial body of legislative and executive rules, ensuring immediate judicial review without regard to the actual application of the rules in practice" (*ibid.*). That result is precisely what the framers of the Constitution sought to avoid by confining the federal judicial power to "Cases" or "Controversies." See 1 Farrand, *The Records of the Federal Convention of 1787* (1911) at 21, 97–98, 108–110, 138–140; 2 Farrand, *op. cit., supra,* at 73–80. It is a consequence that this Court has consistently been careful to guard against throughout its history. See, *e.g.,* C. Wright, *Federal Courts* 34–36, and cases there cited. The Judiciary should not now embark on a new, unchartered course, that will take it into what have traditionally been viewed as Executive and Legislative waters, based only on the broad allegations of those who "[allege] a First Amendment chilling effect and [shiver] in court * * *" (*National Student Association* v. *Hershey, supra,* 412 F. 2d at 1114).

4. This does not mean that action of the Executive Branch goes unchecked until it can properly be brought before the federal courts. Executive programs are established pursuant to legislative authorization; before any such program becomes operative, two other Branches of the government, not insensitive to constitutional limitation, have at least implicitly found it agreeable to the Constitution. To paraphrase Justice

Holmes' comment in *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270: "[I]t must be remembered that [those Branches] are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." See also *United States* v. *Butler*, 297 U.S. 1, 87 (Stone, Brandeis and Cardozo, JJ., dissenting).

It has, of course, long been recognized that Congress, no less than the federal courts, shares an equal responsibility to supervise executive conduct prescribed by federal statute. Thus, contrary to the position of the court of appeals (App. 142), the fact that here "there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action * * *" is not dispositive. The Army is not a mere interloper in the civil disturbance field. Its mission there is specifically authorized by statute. Congress has provided that the President, upon request of any state legislature or governor, may use such of the armed forces as he deems necessary to suppress any insurrection or domestic violence against a state government. 10 U.S.C. 331–333.[25] The President's principal cabinet officer on matters of defense, the Secretary of Defense, has issued a directive (DOD Directive No. 3025.12 (June 8, 1968); 32 C.F.R. 187.1 *et seq.*) establishing uniform policies in

[25] In 1968, the President acted pursuant to that authority on three occasions; Executive Orders 11403 (April 5, 1968), 11404 (April 7, 1968) and 11405 (April 7, 1968); 3 C.F.R. (1968 Comp.) 107–110.

the use of military and civilian personnel, facilities, equipment or supplies during civil disturbances.[26]

For the Army to operate effectively under the authority and responsibility given to it by 10 U.S.C. 331–333, certain intelligence information obviously is needed. As the court of appeals recognized (App. 137), "[n]o logical argument can be made for compelling the military to use *blind* force" (emphasis in original). Accordingly, one of the enumerated responsibilities of the Secretary of the Army under DOD Directive No. 3025.12 is to "provide essential planning, operational and intelligence data to the National Military Command Center and the military service command centers on a timely basis to insure that * * * [the proper authorities] are adequately informed" (32 C.F.R. 187.6).

The Army domestic surveillance system involved here was, as we noted earlier, established in direct response to the wave of civil disorder and violence that swept this country in the late 1960's (App. 87–91). As the court below pointed out (App. 135–136): "Many violent protests were aimed directly at military functions and installations themselves, as in ransacking Selective Service offices, barring troops and supply trains by prostrate bodies on the tracks, unlawful attempts to enter military bases or demonstrations thereon, and harassment of defense-oriented

[26] The Directive designates the Secretary of the Army as the "Executive Agent for the Department of Defense in all matters pertaining to the planning for, and the deployment and employment of military resources in the event of, civil disturbances" (32 C.F.R. 187.6).

businesses." Many others, of course, were directed elsewhere. In order to control these civil disturbances, local and state authorities found it necessary to call for assistance from federal troops with increasing frequency during this period; "the Army and the National Guard [were] called upon to act to preserve domestic peace against violent protests leading to civil disorders, a role for the military which was not unforeseen in our Constitution" (App. 135).

To meet this situation, the Army engaged in civil disturbance intelligence activities "directed primarily at ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act" (App. 70). Cf. *Report of the National Advisory Commission on Civil Disorders,* p. 269 (Supp. March 1, 1968). Contrary to the suggestion in Mr. Pyle's article (App. 28), the Army's purpose was not to "distribute and store detailed reports on the political beliefs and actions of individuals and groups." Rather, the military attended public gatherings with a potential for civil disorder for reasons similar to those noted in *Anderson* v. *Sills,* 56 N.J. 210, 222, 265 A. 2d 678, 684–685 (Sup. Ct. N.J.), for local police surveillance in similar situations:

> In the current scene, the preventive role requires an awareness of group tensions and preparations to head off disasters as well as to deal with them if they appear. To that end the police [or the Army] must know what forces exist, what groups or organizations could be

> enmeshed in public disorders. This is not to ask the police [or the Army] to decide which are "good" and which are "bad." In terms of civil disorders, their respective virtues are irrelevant, for a group is of equal concern to the police [or the Army] whether it is potentially the victim or the aggressor. The police interest [and the Army interest] is in the explosive possibilities and not in the merits of the colliding philosophies. * * *

If, in performing this essential intelligence function, the Army, as respondents claim, exceeded the authority granted to it by Congress to carry out its civil disturbance mission, there is here an available forum outside the courts in which the public can air its general grievances. The Legislative Branch is particularly well suited to act as a check on such activity of the Executive Branch that sweeps too broadly. Indeed, as the dissent below pointed out (App. 154 n. 5), when dealing with issues of the sort presented here, which are "tremendously complex" and involve "broad questions of both law and policy," their resolution "is much better undertaken, at this juncture, by the Congress than it is by [the courts]."

Nor are we talking here in terms of theoretical possibilities. "[J]udicial notice may be taken that Congress is presently conducting public hearings upon the policy questions involved in this very area where the named plaintiffs here seek judicial intrusion"

(App. 154).[27] Partially as a response to congressional concern over the scope of the Army's civilian intelligence operations, the military domestic surveillance system has been cut back sharply. Not only has the bulk of information collected in the late 1960's been destroyed, but current intelligence operations in this area are now carefully restricted to specialized situations where civil disorder appears imminent; Army field personnel are generally no longer to prepare and submit to Intelligence Command "spot reports" on their surveillance activity (see pp. 9–10 *supra*; and see Appendix B; *infra*, pp. 47–51).

Thus, even if it is unlikely "that a better opportunity will later arise to test the constitutionality of the Army's action" (App. 142), that is perhaps a sufficient reason for the judicial branch to stay its hand, for its means that judicial intervention is in fact not necessary to protect those on whose behalf these respondents have purported to sue. The challenged activity of the Executive Branch has already been reviewed. Congress, which shares a co-equal obligation to supervise the performance of executive functions, has undertaken to examine extensively the Army's civil disturbance intelligence operation to determine whether it exceeds the authority conferred by statute. That body is particularly well suited to the task. In the absence of a clearly defined controversy presented

---

[27] The Senate Judiciary Subcommittee on Constitutional Rights has already held extensive hearings on Computers, Data Banks and the Bill of Rights. See 117 Cong. Rec. S. 985 (daily ed., February 8, 1971). We have been advised that these hearings are now being printed.

by persons who assert a specific, identifiable, and direct injury to themselves, there is no need for the federal courts, further removed from the "impact of actuality" (App. 154 n. 5), to duplicate that effort.

B. RESPONDENTS HAVE NO STANDING TO MAINTAIN THIS SUIT

Although "[s]tanding is an aspect of justiciability" (*Flast* v. *Cohen, supra,* 392 U.S. 98), analytically the focal point of discussion in this area is on the concept of personal injury and not on the concept of ripeness. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated" (*id.* at 99).

In order to have standing to challenge the government activity questioned here, plaintiffs must demonstrate "a personal stake in the outcome of the controversy." *Baker* v. *Carr,* 369 U.S. 186, 204. "[L]itigants who have not been harmed or threatened with immediate harm by administrative action have no standing to attack it." *Danville Tobacco Association* v. *Freeman,* 351 F. 2d 832, 833 (C.A.D.C.). Consequently, as this Court stated in *Association of Data Processing Service* v. *Camp,* 397 U.S. 150, 152, an essential requirement of standing is that "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."

1. If, as the majority below found (App. 139), the harm, or threat of harm, in this case is measured in terms of the *"present inhibiting effect"* on the exercise of First Amendment freedoms of speech and as-

sociation, generated solely by the *"present existence of this* [military surveillance] *system,"* plaintiffs are not proper parties to request adjudication of the constitutional issues raised. By their own admission in the court below (App. 148), they "are *not people, obviously, who are cowed and chilled* * * * " (emphasis in original). Rather, they have come forward to assert the present inhibitory effect of such a system "to represent millions of Americans not nearly as forward, as courageous, as willing as them to open themselves up to public investigation and public scrutiny" (*ibid.*).

Thus, plaintiffs do not seek to protect their own personal (cf. *Dombrowski* v. *Pfister, supra*) or associational interests (see *NAACP* v. *Alabama,* 357 U.S. 449, 459).[28] They admit—indeed they assert—that their attendance and speech (or that of their membership) at future public gatherings will not be deterred by the possibility of Army surveillance. They come into court instead, to use the words they used in the court of appeals, as self-appointed "private attorneys general" (C.A.Br. p. 40), acting on behalf of "millions of Americans" (App. 148).

---

[28] In addition to its representational interests, an organization could have interests of its own which might "be injured in fact"—an interest in uncoerced membership (*NAACP* v. *Alabama, supra*), financial or proprietary interests (*Pierce* v. *Society of Sisters*, 268 U.S. 510), or the like. But the named associations in the instant case have made no such claim of injury, either to themselves or to their membership.

The concept of "private attorneys general" is one that has undergone significant expansion in recent years. See, *e.g.*, Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 272–274. That expansion has come, however, essentially from Congress and not from the courts. It is generally recognized that Congress may confer standing on a limited class of persons—such as competitors hurt by a grant of a license, or consumers hurt by a price-fixing order—"to bring a suit to prevent action by an officer in violation of his statutory powers * * * (*Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (C.A. 2), vacated for mootness, 320 U.S. 707). Leading cases in the courts of appeals which are often cited for expanding the law of standing are characterized by just such specific congressional judgments. See, *e.g.*, *Scenic Hudson Preservation Conf.* v. *Federal Power Commission*, 354 F. 2d 608, 615 (C.A. 2) (statute requires consideration of environmental and recreational factors, and permits review at behest of any "aggrieved" party); *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F. 2d 994 (C.A.D.C.) (statute requires consideration of service to listening public, and permits review at behest of any "aggrieved" party).

Where Congress has seen fit to take such action, however, it has conferred a right to sue on a specified class of persons who have suffered a particular and ascertainable injury as a result of the challenged of-

ficial action.[29] When acting without the direction of Congress, the courts are, and should be, much more hesitant to extend standing to new groups of suitors; certainly as a minimal requirement they should adhere to the criterion of particular and ascertainable injury that has guided Congress.

In short, one should not be permitted to obtain judicial adjudication of personal protests against a governmental program merely on the basis of a claim of generalized injury to "millions of Americans." Some "logical nexus between the status asserted [by the litigant] and the claim sought to be adjudicated" is necessary. *Flast* v. *Cohen, supra,* 392 U.S. at 102. Even when suing in the self-appointed capacity of "private attorneys general," plaintiffs must demonstrate something more than "merely a general interest common to all members of the public." *Ex parte Levitt,* 302 U.S. 633, 634. The group represented must be specifically identified by an alleged "distinctive and discriminating harm" (*Barlow* v. *Collins,* 397 U.S. 159, 172 n. 5; Brennan, J., concurring and dissenting) that sets it apart from the public at large. See *e.g., Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1; *Investment Co. Institute* v. *Camp,* 401 U.S. 617. It is not enough to allege, as respondents have done here, merely a "generalized grievance about the conduct

[29] See, *e.g.,* Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a) ("person aggrieved"); Section 24(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79x (a) (same); Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b) (same); Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1) (persons "adversely affected"); Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20) ("any party in interest").

of government" (*Flast* v. *Cohen, supra,* 392 U.S. at 106). As the District of Columbia Circuit recently pointed out in *Davis* v. *Ichord,* 442 F. 2d 1207, 1216 n. 19:

> There may be cases where injury that is done or immediately threatened to some members of a defined group of which plaintiff is a party may be sufficient to give rise to a chilling effect upon the plaintiff; but the mere bringing of an action as a class action on behalf of "all persons who seek to exercise freely their rights guaranteed in the First Amendment" does not avoid the requirement of the specificity necessary to state a case or controversy.[30]

In the latter situation—which accurately describes what respondents have done here—where the parties themselves have suffered no injury and do not occupy an adversary position sufficient to invoke a federal court's jurisdiction, the claim of representation of a class of "millions of Americans" cannot provide the necessary nexus to the constitutional infringement al-

[30] In *Davis,* plaintiffs asserted, *inter alia,* that a House Committee had compiled thousands of dossiers on political protestors which it had made available, unlawfully, to both government and private groups for the purpose of harassing and intimidating members of the class plaintiffs claimed to represent. The court of appeals (Judge Leventhal concurring on separate grounds), in holding that the controversy was not justiciable and that plaintiffs had no standing to seek injunctive relief against further use by the House Committee of the dossiers, stressed that "[t]he Supplemental Complaint * * * seeks to bring appellees into conflict with appellants only by alleging the use or threat of use of dossiers in a manner harmful not to appellants but to others, in the exercise of their constitutional rights * * *." (442 F. 2d at 1212)

leged to enable them to maintain the suit. See, *e.g.*, *Troutman* v. *Shriver*, 417 F. 2d 171, 174 (C.A. 5), certiorari denied, 397 U.S. 923; *Velvel* v. *Nixon*, 415 F. 2d 236, 238 (C.A. 10), certiorari denied, 396 U.S. 1042; *Watkins* v. *Chicago Housing Authority*, 406 F. 2d 1234, 1235–1236 (C.A. 7); *Kansas City, Mo.* v. *Williams*, 205 F. 2d 47, 51–52 (C.A. 8), certiorari denied, 346 U.S. 826; and cf. *Bailey* v. *Patterson*, 369 U.S. 31, 32–33.

2. Nor do respondents stand on firmer footing if their complaint, despite their claim to the contrary (App. 139), is deemed to be based on the possibility of future injury (App. 149 n. 1). Perhaps most, if not all, of the respondents "have been the subject of Army surveillance reports and their names have appeared in the Army's records" (App. 140 n. 17). But they do not complain that the information was obtained by improper means.[31] The reports all relate to "public activities of individuals who *publicly* participate in gatherings and demonstrations which tend to civil disorders and in related activities" (App. 149; emphasis in original).

As pointed out in the dissenting opinion below (App. 150–151), there are a number of proper uses to which such information can legitimately be put by the military. While it is perhaps possible that the Army

[31] As already noted, it is not alleged that the Army has conducted surveillance of wholly private activity (App. 149–150 n. 2). Compare *Local 309, United Furniture Workers of America* v. *Gates*, 75 F. Supp. 620 (N.D. Ind.).

could in the future misuse the information,[32] respondents concededly (App. 149 n. 1) "have alleged no present use, preparation for use or selectivity in gathering information by the Army which would reasonably justify such fears" (compare *Lamont* v. *Postmaster General,* 381 U.S. 301; *Shelton* v. *Tucker,* 364 U.S. 479, 486 n. 7; *Hentoff* v. *Ichord,* 318 F. Supp. 1175 (D.D.C.)). The unfounded fear of unlikely but remotely conceivable misuses of information obtained about respondents does not present a sufficient "personal stake in the outcome of the controversy" (*Baker* v. *Carr,* 369 U.S. 186, 204) to confer standing on these litigants. The point was well stated in *Davis* v. *Ichord, supra,* 442 F. 2d at 1215–1216:

> Nor does the possible use of the information in the Committee's files give rise to an Article III case or controversy between these parties. It is not claimed that any non-legislative use of the Committee's files is authorized by the Committee's mandate, no matter how broadly construed by appellants; and appellants do not allege except as we have indicated that the files have been or will be used to their personal detriment. We think in a frontal attack of this sort upon the Committee some existing or threatened

[32] Since such information has largely been destroyed (see *supra* p. 10), and the Army is presently in the process of eliminating all such information from its USAIRR files (*supra* n. 11), the possibility of misuse is remote. The Army has retained only one copy of the "identification list," and a single copy of each computer data bank that was destroyed, for purposes of this litigation.

adverse action by the present Committee more directly associated with the suitor must be alleged.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and respondents' complaint should be dismissed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
ROBERT C. MARDIAN,
Assistant Attorney General.
ROBERT L. KEUCH,
GEORGE W. CALHOUN,
Attorneys.

JANUARY 1972.

APPENDIX A

Section 331 of Title 10, United States Code, provides:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Section 332 of Title 10, United States Code, provides:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

Section 333 of Title 10, United States Code, provides:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

APPENDIX B

DEPARTMENT OF THE ARMY, OFFICE OF THE ADJUTANT GENERAL, WASHINGTON, D.C. 20310

AGDA (M) (25 May 70) ACSI-CICD 9 JUNE 1970.
Subject: Collection, Reporting, Processing, and Storage of Civil Disturbance Information.

(See Distribution)

1. PURPOSE. This letter establishes Department of the Army policy regarding the collection, reporting, processing, and storage of civil disturbance information. It is applicable within the Continental United States, the States of Alaska and Hawaii, and Puerto Rico. It applies to all Army commands within those geographic areas.

2. DEFINITIONS.

a. Civil disturbance—A situation in which a civil jurisdiction is required to apply a greater than usual degree of police enforcement in order to insure the maintenance of law and order.

b. Civil jurisdiction—A town, city, county, or State; a legal corporate government within the Continental United States, Alaska, Hawaii, or Puerto Rico other than the Federal Government or its departments and agencies.

c. Collection—For purposes of this policy, the acquisition of information in any manner, to include direct observation, liaison with official agencies, or solicitation from official or unofficial sources.

d. Law and order—A condition in which a reasonable degree of the normal operations of a civil jurisdiction is possible.

e. Police enforcement—That force available to a civil jurisdiction in order to insure law and order, such as a city police department, a county sheriff's office, State police, or National Guard in State service.

f. Processing—The collation, evaluation, and analysis of raw information in order to produce finished intelligence.

g. Reporting—For purposes of this policy, communicating information to another person or organization, whether orally, mechanically, or electrically.

h. Storage—For purposes of this policy, the retention of information in any way, to include card files, dossiers, folders, computers, or punch cards.

3. GENERAL.

a. Public order is the responsibility of local and State governments and Federal civilian agencies. The Attorney General is the chief Executive Branch officer responsible for coordination of all Federal Government activities related to civil disturbances. Military forces are responsible for action only when the President has determined, in accordance with Chapter 15, Title 10, U.S. Code, that the situation is beyond the capability of civilian agencies to control.

b. The investigative jurisdiction of the Army with regard to espionage, sabotage, and subversion is in accordance with Executive Order 10450, dated 27 April 1953. It is delineated in AR 381–115, 2 July 1969, and is limited to:

(1) The investigation and disposal of all cases in these categories involving active and retired military personnel of the Army.

(2) The investigation and disposal of all cases in these categories of civilian employees of the Army outside the United States and its possessions.

(3) The disposal of cases on civilian employees of the Army inside the United States and its possessions

c. The Department of the Army relies upon the Department of Justice at the national level to furnish civil disturbance threat information required to support planning throughout the Army for military civil disturbance needs.

d. The Department of the Army relies upon the Department of Justice at the national level to furnish early warning of civil disturbance situations which may exceed the capabilities for control by local and State authorities.

e. Under no circumstances will the Army acquire, report, process, or store civil disturbance information on civilian individuals or organizations whose activities cannot, in a reasonably direct manner, be related to a distinct threat of civil disturbance exceeding the law enforcement capabilities of local and State authorities, except as authorized in paragraphs 8 and 9d.

4. COLLECTION.

a. Army intelligence resources will not be used for the collection of civil disturbance information until the Director for Civil Disturbance Planning and Operations, or the Commander in Chief, Atlantic (CINCLANT) in the case of Puerto Rico only, has made a determination that there is a distinct threat of civil disturbance beyond the capability of local and State authorities to control.

b. Army Military Intelligence elements possessing counterintelligence resources will maintain the capability to collect civil disturbance threat information during a period in which there is a distinct threat of, or actual, civil disturbance requiring the use of Federal military forces.

c. Within the District of Columbia, the criterion is a distinct threat of civil disturbance beyond the capability of the Metropolitan Police to control.

d. Civil disturbance information collection capability of Army elements in the Continental United States, Alaska, or Hawaii will not be employed except on Department of the Army order or, in the case of Puerto Rico, on order of CINCLANT.

e. On activation by the Department of the Army, or CINCLANT for Puerto Rico, Military Intelligence elements possessing counterintelligence capability will:

(1) Establish and maintain liaison with appropriate local, State, and Federal authorities.

(2) Through liaison, collect civil disturbance information concerning incidents, general situation, and estimate of civil authorities as to their continued capability to control the situation.

(3) Report collection results to Department of the Army, ATTN: ACSI–LA, and DCDPO. In Puerto Rico only, report results to CINCLANT with information copies to DA, ATTN: ACSI–LA, and DCDPO.

(4) Keep appropriate commanders informed.

(5) Provide intelligence support to the Personal Liaison Officer, Chief of Staff, Army, and the Task Force Commander on arrival in the affected area.

(6) Recommend methods of overt collection, other than liaison, if required, to Department of the Army for approval.

f. Army Military Intelligence elements will employ methods of collection other than liaison only on order of Department of the Army.

g. Covert agent operations will not be used to obtain civil disturbance information on individuals or organizations without the concurrence of the Federal Bureau of Investigation and the specific approval of each operation by the Under Secretary of the Army.

h. Unsolicited Sources.

(1) So-called walk-in sources who volunteer civil disturbance information to Army elements will be referred to appropriate local police or local offices of the Federal Bureau of Investigation. If the source refuses such referral the information will be obtained and immediately furnished to the proper office.

(2) Information received from anonymous telephone callers or written will be referred as indicated in paragraph 4h(1) above.

5. REPORTING.

a. Army elements will maintain the capability of reporting civil disturbance information.

b. Civil disturbance information reporting will be activated only on Department of the Army order. In Puerto Rico, reporting will be activated only on order of CINCLANT.

6. PROCESSING.

a. OACSI, DA, has the sole responsibility for processing civil disturbance information in accordance with the definition outlined in paragraph 2 above at all times when Federal troops are not actually placed on standby or committed.

b. When the Director of Civil Disturbance Planning and Operations directs that Federal troops be placed on standby or committed to assist in restoring order, those Army elements involved will also be responsible for processing civil disturbance information in support of their local planning.

7. DISSEMINATION. Analyzed reports will be furnished to appropriate major Army commands in CONUS, Alaska, Hawaii, and Puerto Rico, when it appears that a civil disturbance poses a distinct threat beyond the capabilities of local and State authorities to control.

8. PLANNING. Civil disturbance plans and supporting materials will not include listings of organizations and personalities not affiliated with the Department of Defense. Exceptions to this policy are:

a. Listings of local, State, and Federal officials whose duties include responsibilities related to control of civil disturbances may be compiled and maintained.

b. Appropriate data on vital public and commercial installations/facilities or private businesses and facilities which are attractive targets for persons or groups engaged in civil disorder may be compiled and maintained.

9. STORAGE.

a. Army elements will be prepared to store civil disturbance information during a period in which there is a distinct threat of, or an actual, civil disturbance requiring the use of Federal military forces.

b. Adverse civil disturbance information relating to persons or organizations within the Continental United States, Alaska, Hawaii, or Puerto Rico, will not be stored except on order of Department of the Army.

c. Spot reports generated by activation of civil disturbance information collection will be destroyed within 60 days of the termination of the situation to which they refer.

d. After-action reports, where required for clarity, may contain names of individuals or organizations that were directly involved in the civil disturbance being reported. Inclusion of names of organizations and individuals will be kept to the absolute minimum for the purpose of the report.

e. Upon termination of a civil disturbance situation, the nature and extent of all accumulated files other than spot reports and afteraction reports will be re-

ported to Department of the Army, ATTN: ACSI–CIC, with recommendation for destruction or release to the Department of Justice.

f. Army elements will be prepared, on Department of the Army order, to destroy accumulated files or forward them to Department of the Army, ATTN: ACSI–CIC, for release to Department of Justice.

g. Computerized data banks for storage of civil disturbance information will not be instituted or retained without the approval of the Chief of Staff and the Secretary of the Army.

10. The collection, reporting, processing, and storage of information related to Army personnel security programs, counterintelligence operations, and special collection requirements related to direct threats to Army personnel, installations, or materiel are not affected by this letter.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/ Robert E. Lynch

/s/ ROBERT E. LYNCH,

Colonel, AGC, Acting The Adjutant General.

DISTRIBUTION:

Commander in Chief, US Army, Pacific

Commanding Generals:

US Continental Army Command

CONUS Armies and Military District of Washington

US Army Materiel Command

US Army Combat Developments Command

US Army Strategic Communications Command

US Army Security Agency

US Army Air Defense Command

US Army Intelligence Command

US Army SAFEGUARD System Command

US Army Computer Systems Command

US Army, Alaska
Copies Furnished:
Commander in Chief, US Army, Europe
Commander in Chief, Atlantic
Commander, US Army Forces Southern Command

APPENDIX C

DEPARTMENT OF THE ARMY, WASHINGTON, D.C.
6 MARCH, 1970.

MEMORANDUM FOR THE CHIEF OF STAFF UNITED STATES ARMY

Subject: Restrictions on Intelligence Operations Involving Civilian Activities.

I appreciate the prompt and vigorous actions taken by General Palmer, General McCaffrey and General McChristian to eliminate the computer data banks, containing information on civilians, which were identified during the recent review of Army civil disturbance intelligence activities. The actions taken are a step toward limiting Army civil disturbance intelligence activities strictly to activities which have a clear potential for developing into a major disturbance beyond the capability of local and state law enforcement officials and the state National Guard.

I understand that General McCaffrey and General McChristian are reviewing still other measures, such as reductions in direct overt observations of incidents in progress, liaison with local authorities, and related "spot reporting" activities. The Under Secretary and the General Counsel will continue to work with your representatives to assure that appropriate further actions are taken in these other areas.

With respect to computerized data bank operations, it seems clear that the dangers of such systems require strong, centralized control over their creation and use. Accordingly, confirming the verbal policy which I stated to the General Counsel in connection

with responding to recent Congressional inquiries on the subject, no such intelligence data bank operations relating to civil disturbance or other activities involving civilians not affiliated with the Department of Defense should be instituted without the approval of the Secretary of the Army and the Chief of Staff. In view of the sensitivity of such operations, approvals will not be granted without consultations with the concerned committees of Congress.

In order to insure that no Army element in the United States is maintaining this type of system, I would appreciate your asking all commanders in CONUS, Alaska and Hawaii, down to the installation level to report whether their command has any form of computerized data bank relating to civilians or civilian aetivities, other than data banks dealing with routine administrative actions such as finance or personnel records involving Army personnel or employees. If a command has such a data bank, the data bank should be immediately destroyed, unless a report justifying its existence is submitted for approval as indicated above.

STANLEY R. RESOR,
Secretary of the Army.

U.S. GOVERNMENT PRINTING OFFICE: 1971